No. 21097

In the
United States Court of Appeals
For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF CROSS-APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

CLEMONS, SKILES & GREEN
Attorneys for Cross-Appellee
1110 Bank of Idaho Bldg.
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STATEMENT OF THE CASE

This is a cross appeal by the plaintiff and appellee (cross-appellant) from the decision of the District Court finding against cross-appellant on counts II and III of cross-appellant's complaint.

Counts II and II of the complaint involve only one transaction.

On February 10, 1964, a woman giving her name as Clara Perkins deposited a check (Pl. Ex. 1), which

appeared to be a cashier's check drawn on The First National Bank of San Angelo, Texas. Count II of the complaint alleges the check to have been passed through false pretenses. Count III alleges the check to have been a counterfeit instrument.

The check was drawn on The First National Bank of San Angelo, Texas, which is a bank in existence (Tr. Vol. 3, p. 37) and was transferred to that bank but was returned marked "unpaid, 2-17-64, forgery" (Tr. Vol 3, p. 38, deposition W. G. Pitzer, p. 7) and was so recorded by the cross-appellant bank (Tr. Vol. 3, p. 40)

The check was purported to be a cashiers check, signed by James C. Bolton, but apparently no person by that name had been employed by the Texas bank (Deposition W. G. Pitzer, pp. 7-8).

The trial court held that the check constituted a forgery and was excluded under the terms of the Blanket Bond, No. 24, issued by the cross-appellee to the cross-appellant bank.

The application for the Bankers Blanket Bond excluded forgery (Def. Ex. 5). The first rider to the bond which was issued (Pl. Ex. 4) September 1, 1961, by its provisions, deleted section D, relating to loss through forgery, and there was also excluded by this rider the figures and letter, "D," wherever they appear in subsections (a) and (d) of Section 1. Thus all coverage relating to forgery was deleted and excluded from the bond.

ARGUMENT

Cross-appellant contends the money obtained through the passage of the check was obtained either through

false pretenses or by the passage of a counterfeit instrument. Cross-appellee contends that the check was a forgery and excluded from the provisions of the bond.

I

FORGERY

Naturally, there is no definition of forgery in the State of Idaho except that as defined by the Idaho Statutes.

Section 18-3601 and 18-3606, Idaho Code, define what constitutes forgery and what is a forged instrument, 18-3601 provides in part:

> "18-3601—Forgery defined. Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits, any * * * bank bill, or note, post note, check draft * * * or utters, publishes, passes or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters * * * with intent to prejudice, damage or defraud any person * * * is guilty of forgery." Section 18-3606 defines certain fictitious instruments as forgery.

The Supreme Court of Idaho, State vs. Allen, 53 Idaho 737, 27p 2d 482, has said:

> "* * * So that since the amendment of Section 8414, C.S., now Section 17-3706, I.C.A., any and all of the acts mentioned in Section 17-3706, as well as any and all of the acts mentioned in Section 17-3701 I.C.A., constitutes forgery."

17-3706 and 17-3701, I.C.A., are now 18-3606 and 18-3601, Idaho Code.

Then in State vs. McDermott, 52 Idaho 602, 17p 2d 343, it was said:

> "Under the Statutes (I.C.A. Section 17-3701; C.S. Section 8408) either the making or uttering, a forged instrument is a crime, there being no degrees thereof. The crime consists in doing one, or more of the acts set forth in the Statute * * * as constituting forgery * * *."

And in State vs. Baldwin, 69 Idaho 459, 208 p 2d 161, at page 164 of the Idaho Report;

> "* * * Sections 18-3601 and 18-3606, F. C. defining forgery sets forth a great many acts and means by which the crime may be committed. The commission of any one of the proscribed acts, with intent to defraud, is sufficient. * * * Further, the crime is committed by the making, altering, etc., with the necessary intent as well as by uttering, publishing, passing, etc., with intent. If the prosecution proves the commission of the offense by either of these means, it is sufficient. The State is not required to prove both, as was requested by the appellant."

COUNT II

One of the elements of the commission of forgery is the intent to defraud.

Plaintiff apparently recognized the element of forgery present here, and that the bond does not afford coverage as to forged instruments. Thus in Count II, plaintiff attempts to allege that this check was passed by means of false pretenses. Such allegation apparently being for the purpose of escaping the forgery exclusion. Such conclusion may be drawn from the alle-

gations of Count IV which alleged the check to be a forgery.

But there is a false pretense present in the uttering or passing or attempting to pass any instrument the result of which constitutes forgery. Actually there cannot be a forgery without a false pretense.

In the instant case we have the making of a false check or the passing of a false check. It is forgery notwithstanding that some pretense was also present at the same time which pretense was false. In People's Bank and Trust Company vs. Fidelity and Gas Company, 231NC510, 57SE 2d 809, 15 ALR 2d 996, the court commented upon the evidence and said that the facts might constitute either forgery or false pretense, but that under a policy excluding forgery there was no coverage. If it was forgery, it made no difference that it might also constitute false pretenses. The court said:

> "We are not concerned here with the niceties which might be observed by the solicitor in choosing the subject of prosecution, — whether false pretense or forgery. We are convinced that if the culpable Langley had been tried and convicted of either offense the State would be estopped under the principle of former jeopardy of trying him again upon the other, since either crime must be predicated upon the same transactions. State v. Bell, 205 NC 225, 171 SE 50. And we may observe, too, in that connection, that in a long series of transactions occurring during the four months Langley of Nash Street dealt with the account of Langley of R.F.D., forgery may have been aided by parol false pretense. Under a policy which expressly rejects liability for any loss effected directly or indirectly by forgery *it makes no*

difference which was the crime and which the adulterant. The policy only covers the listed losses, not loss in general, and a clause which in plain terms rejects, in what must be considered the body of the instrument loss which is effected directly or indirectly by forgery, is not an exception from a general coverage, leaving the burden on the defendant to bring itself within it.

It appears from the evidence that loss by forgery was deleted from the instrument, because such a coverage would have to be paid for by a higher premium, in language which does not constitute a prima facie covering.

Thus no relief can be granted under Count II.

II

COUNTERFEITING

Cross-appellant then contends that if the passage of the check does not constitute false pretenses under the terms of the bond, it is loss occurred through a counterfeit instrument, and covered under the provisions of insuring clause (E).

Insuring Clause (E), in addition to the rider excluding Clause (D) (forgery) contains the following exclusion:

"* * * EXCLUDING, HOWEVER, any loss through forgery or operation of, on or in any checks, drafts, acceptances, withdrawal orders, or receipts for the withdrawal of funds or property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasurers; and excluding,

further, any loss specified in subdivisions (1) and (2) of insuring clause (D) as printed in this bond, whether or not any amount of insurance is applicable under this bond to insuring clause (D)."

Thus whether clause (D) is in effect or not, forgery is excluded from insuring clause (E).

But insuring clause (E) comes under the heading "Securities." "Securities" as commonly known under our statutes come under what is generally known as the Blue Sky Laws. It comprises stocks, bonds and the like which are also generally referred to as investments.

In 47 Am. Jur., Securities, Section 16, page 574-575, it is said:

"The term 'securities' as used in securities acts, is frequently defined in the act itself. As to the scope and application of so-called 'Blue Sky Laws' with respect to instruments not covered by express statutory definition, it has been said that to lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without registrations or official sanction * * * There is likewise no hard and fast rule as to what constitutes a "security" within the meaning of that term as used in the Federal Securities Act of 1933, * * * The following have been held to be within the operation of the statute: a participation trust certificate in producing oil royalties * * * so-called time trust certificates; 'shareholders receipts,' and various other contracts and instruments in the nature of profit sharing agreements. The Federal Securities Act of 1933 applies to issues of securities by a foreign government,

as well as to private securities."

And although we think that "Securities" under insuring clause (E) is something entirely different than the instrument involved here in this case, clause (E) itself clearly excludes coverage as to this type of instrument as clause (E) itself as above quoted *provides:*

> "* * * excluding, however, any loss through forgery or alteration of, on or in *any checks* * * * and excluding, further, any loss specified in subdivisions (1) and (2) of insuring clause (D) * * *"

On the other hand, counterfeiting is generally appiled to imitation of money, or governmental coins or other governmental obligations. Black's Law Dictionary, 4th Ed. (1951) defines

> "COUNTERFEIT. In Criminal Law, To forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine. Most commonly applied to the fraudulent and criminal imitation of money.
> (citing authority)."

While Sections 18-3601 and 18-3606, Idaho Code, above quoted to some extent treat forgery, counterfeit and fictitious as one and the same, and prescribe the penalty for each to be forgery, the statutes also treat counterfeiting as relating to money. Thus Section 18-3607, Idaho Code provides:

> "18-3607. COUNTERFEITING COIN OR BULLION. — Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind of species of gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells,

passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes or procures the same to be sold, uttered or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting."

Sections 18-3608 to 18-3611 then provide for punishment of counterfeiting, possessing counterfeiting apparatus, etc. Thus forgery and counterfeiting are treated separately.

The language of the policy should be taken according to its ordinary and accepted meaning. Although cross-appellant contends that the provisions of an insurance policy should be construed against the insurer, the terms of the policy should not be misconstrued to obtain that end.

In *Indemnity Insurance Co. v. Pioneer Valley Savings Bank*, 343 F. 2d 634, which is cited by appellee (appellee's brief, page 9) this statement is made:

"It is true, as defendant contends that if the language of a policy is clear and unambiguous, it is the simple duty of the trial court to give effect to such contractual language in harmony with its plain and unambiguous meaning. The trial court is not clothed with the authority to make, or to revise the contract of the parties. * * *"

And also in *First National Bank of South Carolina v. Glens Falls Ins. Co.*, 304 F. 2d 866, cited by appellee (appellee's brief page 18) it is said:

"In our judgment the limitation cannot be ignored. It is familiar law in South Carolina and else-

where that the terms of an insurance contract must be construed in favor of the insured and against the insurer where the words of the policy are ambiguous, but where there is no ambiguity a contract of insurance, like other contracts, must be construed according to the plain and ordinary meaning of its terms. * * *"

Respectfully submitted,

CLEMONS, SKILES & GREEN

By _____

Attorneys for Cross-Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. STANLEY SKILES, Attorney

ACKNOWLEDGMENT OF SERVICE

The undersigned, attorneys of record for cross-appellant herein, hereby acknowledges receipt of three copies of the foregoing brief this _____ day of_____, 1966.

LANGROISE, CLARK & SULLIVAN

By _____

Attorneys for Cross-Appellant

APPENDIX OF EXHIBITS

Exhibit	Identified	Offered	Admitted or Rejected
Plaintiff's 1		Pre-Trial Order	
Plaintiff's 4		Vol. 3, p. 2	Vol. 3, p. 2
Plaintiff's 5		Pre-Trial Order	